IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TODD JANSON, GERALD T. ARDREY, CHAD M. FERRELL, and C & J REMODELING LLC, on behalf of themselves and on behalf of all others similarly situated, Plaintiffs, v. LEGALZOOM.COM, INC., Defendant.	Case No. 2:10-cv-04018-NKL

DEFENDANT LEGALZOOM.COM, INC.'S SUGGESTIONS IN
OPPOSITION TO PLAINTIFFS' MOTION TO EXCLUDE EXPERT TESTIMONY

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INTRODUCTION

Plaintiffs have moved the Court to exclude the expert testimony of Dean Burnele V. Powell proffered by Defendant LegalZoom.com, Inc. ("LegalZoom"). Plaintiffs argue that Dean Powell's report (the "Report") offers the legal conclusion that LegalZoom does not engage in the unauthorized practice of law and that case law broadly prohibits the expert testimony of lawyers and law professors on legal issues. These arguments reflect a mischaracterization of both the law and Dean Powell's testimony.

Case law regularly approves the testimony of lawyers and law professors on the history, practices, and standards of a business or industry, including applicable legal standards. A large number of cases routinely recognize that, just as doctors may testify as experts in cases involving the practices and standards applicable to medicine, lawyers are permitted to give expert testimony in cases involving the practices and standards applicable to the legal profession.

Dean Powell's Report does not offer legal conclusions. Contrary to plaintiffs' argument, Dean Powell does not offer an opinion on the ultimate legal issue of whether the LegalZoom website constitutes the unauthorized practice of law under Missouri law. Rather, he (1) addresses background and historical information on the practices and standards applicable to the legal profession and (2) articulates factual opinions on how the LegalZoom website operates and how that website compares to the sale of legal forms and information on completing such forms.

This case encompasses subjects with which jurors are likely to be unfamiliar, including the use and sale of legal forms, the impact of the use of computer and internet technology on the process of completing forms, and the nature of the practice of law. Dean Powell's testimony will

clearly assist the jury to understand the evidence and to determine the facts in issue, and therefore the Court should deny plaintiffs' motion to exclude that testimony.

ARGUMENT

I. EXPERT TESTIMONY SHOULD BE ADMITTED IF IT HELPS THE JURY UNDERSTAND THE EVIDENCE OR DETERMINE THE FACTS

The standard for admission of expert testimony is contained in Rule 702 of the Federal Rules of Evidence, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 702 represents a liberalization of traditional barriers to the admissibility of expert testimony and favors the admission of such testimony. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); *Weisgram v. Marley Co.*, 169 F.3d 514, 523 (8th Cir. 1999), *aff'd on other grounds*, 528 U.S. 440 (2000); 4 WEINSTEIN'S FEDERAL EVIDENCE § 702.02[1] (2011) ("Expert testimony is liberally admissible under the Federal Rules of Evidence. The general approach of the Rules is to relax traditional barriers to expert opinion testimony. The presumption under the Rules is that expert testimony is admissible.")

The proponent of expert testimony must show its admissibility only by a preponderance of the evidence. *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001) (citing *Daubert*, 509 U.S. at 592). "Doubts regarding whether an expert's testimony will be useful should generally be resolved in favor of admissibility." *United States v. Finch*, 630 F.3d 1057, 1062 (8th Cir. 2011) (quoting *Sphere Drake Ins. PCL v. Trisko*, 226 F.3d 951, 954 (8th Cir. 2000)); *see also Williams v. Wal-Mart Stores, Inc.*, 922 F.2d 1357, 1360 (8th Cir. 1990). Thus,

"[a] trial court should exclude an expert opinion *only if it is so fundamentally unsupported that it cannot help the factfinder*." *Williams*, 922 F.2d at 1360 (emphasis added) (quoting *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989)).[1]

Plaintiffs do not challenge Dean Powell's qualifications or argue that his testimony does not meet the factors enumerated in Rule 702. The only question before the Court, therefore, is whether Dean Powell's specialized knowledge "will assist the trier of fact to understand the evidence or to determine a fact in issue."

II. DEAN POWELL'S REPORT DOES NOT OFFER LEGAL CONCLUSIONS BUT RATHER PROVIDES INFORMATION THAT WILL HELP THE JURY UNDERSTAND THE EVIDENCE AND DETERMINE THE FACTS

Dean Powell's report discusses the following topics:

- The history of enforcement of restrictions on the unauthorized practice of law in this county, from the Colonial Era to the Civil War, from the Civil War to the Great Depression, from the Great Depression to the 1970s, and from the 1970s to the present. Report at 3-15, Doc. 87 at 19-31.

- The legal profession's historical understanding — and Dean Powell's own understanding, as a law professor, teacher of law school courses on legal ethics and the legal profession, and co-author of the casebook LAWYERS AND THE LEGAL PROFESSION: CASES AND MATERIALS — that the practice of law entails giving personal advice on specific problems to a readily identifiable person and/or personal contact in the nature of consultation, explanation, recommendation or advice. Report at 2, 12, Doc. 87 at 18, 28.

- How software and computer technology have been applied to the practice of selling and filling out legal forms. Report at 21, Doc. 87 at 37.

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[1] Plaintiffs' reliance on *United States v. Vargas*, 471 F.3d 255, 265 (1st Cir. 2006), is misplaced. *See* Plaintiffs' Suggestions at 6, Doc. 87 at 10. The portion of the case cited by plaintiffs deals with the reliability prong of Rule 702, and plaintiffs do not challenge the reliability of Dean Powell's testimony. Indeed, on the same page the *Vargas* court quoted *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 80 (1st Cir. 1998), to the effect that "'[a]s long as an expert's scientific testimony rests upon good grounds, based on what is known, it should be tested by the adversary process — competing expert testimony and active cross-examination — rather than excluded from jurors' scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies.'" 471 F.3d at 265.

- Dean Powell's own use of the LegalZoom website to create legal documents, including a will, an LLC, and a power of attorney. Report at 16-18, 22-23, Doc 87 at 32-34, 38-29.

- What kind of assistance and instruction was contained in the divorce kit in *In re Thompson*, 574 S.W.2d 365, 369 (Mo. banc 1978). Report at 22, Doc. 87 at 38.

- How the services offered on LegalZoom's website compare factually to the assistance and instruction provided in the divorce kit in *Thompson*. *Id.*

As the Court noted in its certification Order, "the central issue of the case" will be "what type of online interaction between buyer and seller of legal forms constitutes 'assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights.'" Doc. 61 at 10.

Dean Powell's report offers historical background on the practice of law and on the use and sale of legal forms, and a comparison of approved activity to the services offered on LegalZoom's website. Assuming the case is not resolved, as LegalZoom believes it should be, by LegalZoom's motion for summary judgment, the Report is specifically directed toward providing information that will help the jury understand the evidence and determine the facts at issue in the case.

To a lay juror, what lawyers do is likely to be cloaked in mystery. Jurors are not likely to understand how lawyers apply legal knowledge to a client's individualized situation. They are also unlikely to know of the long history of the use and sale of legal forms in this country. And they will have little understanding of whether or how what lawyers do differs from selling blank legal forms and providing instructions for filling them in. Given the facts at issue in the case, Dean Powell's testimony will be of great assistance to a jury in understanding the evidence and determining the facts.

Moreover, under long-standing precedent of the Missouri Supreme Court, the advertisement and sale of blank forms and instructions for filling them in does not constitute the unauthorized practice of law in Missouri if no individualized personal advice is given. *Thompson*, 574 S.W.2d at 369. Jurors are also likely to benefit from guidance in comparing (a) the photocopied blank forms in *Thompson* and the handwritten instructions for filling them in, to (b) LegalZoom's use of online questionnaires and software that automatically inputs their answers into blanks in document templates. Dean Powell's testimony will provide valuable, ground-laying, factual information that will assist the jury in determining whether LegalZoom's website provides more assistance in filling in legal forms than the practice forms and instructions in *Thompson*.

Of course, these ways in which Dean Powell's testimony will assist a jury in understanding the evidence and determining the facts also refute plaintiffs' argument that Dean Powell's testimony is not relevant. To the contrary, his testimony is directly pertinent to the key issues in this case.

Contradicting plaintiffs' argument that Dean Powell's testimony is irrelevant is their argument that the Report posits the legal conclusion that what is offered on the LegalZoom website does not constitute the unauthorized practice of law — in essence, that it is *too* directly relevant to the key issue in this case to be appropriate as evidence. Contrary to plaintiffs' assertions, however (*see* Plaintiffs' Suggestions at 1, 4, 8, 9, Doc. 87 at 5, 8, 12, 13), Dean Powell does not attempt to apply the law to the facts of this case and wholly avoids advancing any opinion on the central question in this case.[2]

[2] Plaintiffs quote one phrase from the Report to give the impression that Dean Powell concludes that "self-help aids should not be treated as the unauthorized practice of law." *See* Plaintiffs' Suggestions at 2, Doc. 87 at 6. This quotation is taken out of context, however. In the

Dean Powell offers opinions based on his expertise primarily as to what he and the legal profession regard as the practice of law, not what activities do or do not constitute the *unauthorized* practice of law. Thus, he concludes that computer-based means for filling in blanks in legal forms is not what is commonly understood as the practice of law:

- "No computer (or owner of a computer) can practice law or render a legal opinion by virtue of providing a mechanism for an individual to record self-generated information." Report at 2, Doc. 87 at 18.

- "Provision of an electronic format for users to fill in the blanks in the manner that the user dictates – whether it involves the use of pre-formatted hard-copy pages of paper, pre-formatted electronic facsimiles of a page of paper, or the uploading of responses to questions that will be recorded electronically and subsequently printed out as pre-formatted electronic facsimiles of a page of paper – has not been what the legal profession has focused on as the practice of law." Report at 3, Doc. 87 at 19.

- "No reasonable person who is seeking counsel, advice, recommendations, or explanations would turn to a website, where the most that they could expect to receive is impersonal, generalized, information that is placed into a form, but not focused on the discrete needs of an individualized client." Report at 17-18, Doc. 87 at 33-34.

The Report discusses the *unauthorized* practice of law only in the historical context of what activities have and have not historically been thought to constitute the unauthorized practice of law:

- "[N]o computer-based delivery process falls within the scope of activities that have historically been understood to be the practice of law or that have historically been targeted for regulation as the unauthorized practice of law." Report at 2, Doc. 87 at 18.

This is historical background. It is not opinion, it is fact — and it is undisputed fact.

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passage from which the phrase is taken, Dean Powell argues that, in regulatory regimes that do not define the practice of law, it becomes the unauthorized practice of law to do anything lawyers typically do, and that the vagueness of such a prohibition means that "the only practicable solution is to conclude that — no matter how inconvenient they may be as a matter of market-place competition — self-help aids should not be treated as the unauthorized practice of law." Report at 13-14, Doc. 87 at 29-30.

Dean Powell's comparison of the assistance and instructions offered on the LegalZoom website to those found in the divorce kit in *Thompson* is not the application of law to facts. It is the comparison, made with the benefit of his expertise, of one set of facts to another set of facts. Likewise, Dean Powell's testimony about how the LegalZoom website works is entirely factual:

- "[T]he LegalZoom website enables the user to answer questions related to the form in a direct manner, so that by answering an empirical inquiry or choosing between 'Yes' or 'No' the user is able to instruct the computer to take exactly his or her desired course of action." Report at 23, Doc. 87 at 39.

- "What is significant about LegalZoom's interface with the user . . . is more than that it simplifies the production of the form by allowing the user to focus on the desired content of the form spaces, rather than the form itself. . . . [I]t enables the user to instruct the computer on the basis of choices that the user makes – not the computer. Thus, the user can either provide information (*e.g.*, name, address, telephone number); choose between basic alternatives (*e.g.*, an alternative holder of a power of attorney, or not); or indicate preferences from a list of choices." *Id.*

Dean Powell does not testify that the services offered on LegalZoom's website are not and should not be held to be the unauthorized practice of law. Dean Powell does not apply the law to any of his factual conclusions. Jurors are free to reject his conclusions, including that the LegalZoom website allows users to fill in blanks with their own information, that the LegalZoom website is not the application of legal knowledge to a customer's individualized situation, or that a computer cannot practice law. And jurors are free to reach their own conclusion as to the ultimate legal issues.

III. LAWYERS AND LAW PROFESSORS MAY TESTIFY ON HISTORY, PRACTICES, AND STANDARDS APPLICABLE TO AN INDUSTRY

Plaintiffs argue that "courts have uniformly prohibited testimony on legal issues." Plaintiffs' Suggestions at 7 n.2, Doc. 87 at 11 n.2. To the contrary, the Eighth Circuit has recognized that, while legal experts may not testify as to legal conclusions, they may testify as to the history, practices, and standards of a business or industry, including legal standards. In

Police Ret. Sys. of St. Louis v. Midwest Inv. Advisory Serv., 940 F.2d 351, 357 (8th Cir. 1991), the court held that it was error (though not reversible error in the context of a two-month trial that included counterbalancing evidence) to permit an expert to testify to the "reach and meaning" of § 28(e) of the Securities Exchange Act of 1934 governing excessive brokerage commissions. Nevertheless,

> Pickard's expert-witness credentials were impeccable. He had extensive service in the federal government as a regulator of the financial industry. He even helped promote the idea that Congress adopted in § 28(e). He was the ideal witness to explain the history and purpose of that provision. He also had helpful knowledge of how the securities industry responded to § 28(e), its practices and procedures involving soft-dollar arrangements.

Id.

In *Metropolitan St. Louis Equal Housing Opportunity Council v. Gordon A. Gundaker Real Estate Co.*, 130 F. Supp. 2d 1074 (E.D. Mo. 2001), a real estate lawyer was permitted to testify as to "the professional and ethical standards established by Missouri's real estate professional organizations" because his "specialized knowledge" was "relevant to issues present in" a case concerning discriminatory practices of real estate agencies and would "assist the jury in adjudging the facts." *Id.* at 1092. And in a case that is close to the present case in time, geography, and subject matter, Judge Venters of the Bankruptcy Court in the Western District of Missouri was earlier this year asked by the United States Trustee to find that an out-of-state law firm had engaged in the unauthorized practice of law under Missouri Rule of Professional Conduct 4-5.5(c)(1). *In re Brown*, No. 09-44254, 2011 WL 477822 (Bankr. W.D. Mo. Feb. 7, 2011). The court defined the issue as requiring it to determine "(a) whether the Respondents were, indeed, practicing law, and if so, (b) whether that practice of law violated the applicable law and court rules." *Id.* at *2. Although the admissibility of expert testimony formed no part of the court's decision, the court did note that, "[o]n the first point, . . . the Respondents' expert,

Professor Charles Wolfram, opined that their involvement in the case was 'barely' the practice of law." *Id.*

Dean Powell's report and proposed testimony mirror the structure of Professor Wolfram's testimony in *In re Brown*, opining on the practice of law but not the *unauthorized* practice of law. As a teacher and the co-author of a book on legal ethics and the legal profession, Dean Powell is the ideal witness to testify as to the history, practices, and standards at issue here: what has historically been understood to be the practice of law, the history of the sale and use of legal forms in this country, and the history of enforcement of restrictions on the unauthorized practice of law. Likewise, his special knowledge of these historical practices and standards well equips him to help jurors compare the amount of assistance and instruction provided by the LegalZoom website to that provided by the divorce kit in *Thompson*.

These Eighth Circuit and Missouri cases are not unusual. Lawyers and law professors have been extensively permitted to testify both as to the general history and practices of businesses and industries and as to the legal standards governing them. In *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991), Professor John Coffee was the government's first witness in a prosecution for securities fraud, testifying as to the "general background on federal securities regulation and the filing requirements of Schedule 13D." *Id.* at 1294. In *Cary Oil Co. v. MG Ref. & Mktg., Inc.*, No. 99 Civ. 1725, 2003 WL 1878246 (S.D.N.Y, Apr. 11, 2003), another law professor explained general corporate governance principles and how piercing the corporate veil was justified as to two defendants, providing background information that was "crucial if the laymen jury is to understand fully the complex issues in this matter." *Id.* at *5. *See also McCabe v. Crawford & Co.*, 272 F. Supp. 2d 736, 739-40 (N.D. Ill. 2003) (in action alleging violations of Fair Debt Collection Practices Act, law professor who taught and practiced

consumer law was permitted to testify concerning practices and standards in collection agency industry, although the legal conclusions in his report were excluded).

In *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509 (2d Cir. 1977), cited by plaintiffs, the court observed that "testimony concern[ing] the practices of lawyers . . . is admissible under the same theory as testimony concerning the ordinary practices of physicians or concerning other trade customs: to enable the jury to evaluate the conduct of the parties against the standards of ordinary practice in the industry." A number of cases in both the state and federal systems have applied this principle and permitted lawyers to give expert testimony as to the practices and standards applicable to the legal profession. Thus, lawyers routinely testify to practices and standards in areas as diverse as ethical obligations, fee disputes, conflicts of interest, malicious prosecution, and legal malpractice. *See, e.g.*, *Floyd v. Hefner*, 556 F. Supp. 2d 617, 642 (S.D. Tex. 2008) (attorney qualified to offer expert opinion regarding ethical obligations of lawyers sued for legal malpractice and breach of fiduciary duty); *In re Engel*, 169 P.3d 345, 348-49 (Mont. 2007) (attorney expert testified concerning customary fees in case alleging violation of ethical rules by charging excessive fee); *Schlesinger v. Herzog*, 672 So. 2d 701, 711-12 (La. Ct. App. 1996) (law professor's expert testimony on standard for common representation was relevant, reasonable, and worthy of consideration by jury in legal malpractice action arising from attorney's alleged conflict of interest); *McCullough v. Allen*, 449 N.E.2d 1168, 1170 (Ind. App. Ct. 1983) (expert testimony of attorney admissible in malicious prosecution action because "[w]hether a reasonable attorney would consider a claim worthy of litigation is a question that can only be answered by an expert familiar with the law and with the standards employed by reasonable attorneys"); *Roberts v. Sokol*, 330 S.W.3d 576, 581 (Mo. Ct. App. 2011) (as in medical malpractice case, expert testimony is required in legal malpractice case); *First Nat'l*

Bank of LaGrange v. Lowrey, 872 N.E.2d 447, 466-67 (Ill. App. Ct. 2007) (law professor who was expert in professional responsibility qualified to offer expert opinion on standards for communication with client in legal malpractice case).[3]

The cases plaintiffs cite do not support their motion. Many of them simply restate and apply the axiom, with which LegalZoom has no dispute, that an expert may not testify as to the ultimate legal issue in a case.[4] Others involved lawyers whose appearance or testimony was barred for some reason other than the nature of the proposed testimony.[5]

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[3] *See also In re Holocaust Victim Assets Litig.*, 270 F. Supp. 2d 313, 316-19 (E.D.N.Y. 2002) (attorney qualified as expert as to value of legal services); *St. Joseph Hosp. v. INA Underwriters Ins. Co.*, 117 F.R.D. 19, 20 (D. Me. 1987) (insurer entitled to retain local attorney as expert witness as to actions of insurer and its counsel in underlying malpractice action); *Disciplinary Counsel v. Hoskins*, 891 N.E.2d 324, 337 (Ohio 2008) (finding of excessive fee in disciplinary action was supported by attorney's expert testimony regarding defects and inconsistencies in lawyer's time records); *In re Disciplinary Proceedings Against Mandelman*, 714 N.W.2d 512, 527, 529 (Wis. 2006) (attorney testified as expert that it was unclear at relevant time whether retainer was required to be placed in client trust account); *In re Douglass*, 859 A.2d 1069, 1078-79 (D.C. 2004) (expert testimony of attorney concerning conduct of reasonable attorney in personal injury cases was admissible); *Keywell & Rosenfeld v. Bithell*, 657 N.W.2d 759, 781 (Mich. Ct. App. 2002) (in law firm's action against former clients to recover attorney fees, experienced attorney could testify that he concluded parties had a contingent fee agreement).

[4] *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997) (expert not permitted to testify in suit for violation of Americans with Disabilities Act that Act required transit police officer to provide disabled passenger with an interpreter); *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995) (expert in police practices and procedure not permitted to testify in § 1983 action that police officers' conduct was consistent "with the 'standards under the Fourth Amendment'"); *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) (expert not permitted to testify in suit for breach of insurance contract that insurer had duty to hire tax counsel to initiate action against IRS when IRS revoked tax exempt status); *Farmland Indus. v. Frazier-Parrott Commodities, Inc*., 871 F.2d 1402, 1409 (8th Cir. 1989) (in action for fraud and violation of Commodity Futures Trading Commission regulations, expert not permitted to testify that brokers violated regulations).

[5] *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 365, 367, 369 (4th Cir. 1986) (witness described as "an attorney with experience with disclosure documents under the securities laws" might have been qualified to testify as expert on "step-by-step practices ordinarily followed by lawyers and corporations in activities regulated by the securities laws" were he not otherwise

Most importantly, the majority of cases plaintiffs cite confirm LegalZoom's position that, while an expert may not testify as to conclusions of law, he or she may testify on mixed questions of law and fact and on the history, practices, and standards of a business or industry, including applicable legal standards. Thus, in *Marx & Co.*, the Second Circuit held that the lawyer-witness, while not able to testify to legal conclusions, was qualified as an expert in securities regulation "and therefore was competent to explain to the jury the step-by-step practices ordinarily followed by lawyers and corporations in shepherding a registration statement through the SEC." 550 F.2d at 508-09. The court noted that the witness had often testified as an expert witness and that

> This testimony concerned the practices of lawyers and others engaged in the securities business. Testimony concerning the ordinary practices of those engaged in the securities business is admissible under the same theory as testimony concerning the ordinary practices of physicians or concerning other trade customs: to enable the jury to evaluate the conduct of the parties against the standards of ordinary practice in the industry.

Id. at 509 (footnote omitted).[6]

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disqualified as an attorney involved in the litigation) (quotations omitted); *United States v. Curtis*, 782 F.2d 593, 598-99 (6th Cir. 1986) (testimony as to unsettled state of tax law, which was offered to negate scienter of willfulness, was excluded because defendant had not first established that he was aware of any confusion in the law); *Loeb v. Hammond*, 407 F.2d 779, 781 (7th Cir. 1969) (lawyer-witness had appeared as a lawyer in the case).

[6] Likewise other cases cited by plaintiffs: *Pelletier v. Main Street Textiles, LP*, 470 F.3d 48, 55 (1st Cir. 2006) ("in general, the customs and practices of an industry are proper subjects for expert testimony"); *Adalman*, 807 F.2d at 367 (expert testimony of a lawyer is permitted on "ordinary practices of those engaged in [an] industry . . . to enable the jury to evaluate the conduct of the parties against the standards of ordinary practice in the industry"); *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 100 n.12 (1st Cir. 1997) (legal expert "was competent to testify that plaintiffs' [political] appointments were irregular in the sense that they did not conform to normal personnel practice"); *Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1044-46 (D. Ariz. 2005) (legal experts permitted to testify on corporate norms regarding interlocking directors and whether the acts of the parties "fit within those norms"); *United States v. Leo*, 941 F.2d 181, 197-98 (3d Cir. 1991) (testimony of expert in government defense contracting "was relevant both to explain the practice of the industry in which this

Another leading case cited by plaintiffs, *Specht v. Jensen*, 853 F.2d 805 (10th Cir. 1988), expressly rejected the sweeping principle they advance:

> We do not exclude all testimony regarding legal issues. We recognize that a witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible. Indeed, a witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms. . . . These cases demonstrate that an expert's testimony is proper under Rule 702 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function.

Id. at 809-10.[7]

Not even *Casper v. SMG*, 389 F. Supp. 2d 618 (D.N.J. 2005), which plaintiffs discuss in their suggestions, truly supports their argument. Plaintiffs' Suggestions at 8, Doc. 87 at 12. In that case, a law professor and economist was precluded from testifying on legal questions such as whether the defendant qualified as an employer in the construction industry under § 8(e) of the National Labor Relations Act, whether a collective bargaining agreement was binding on the defendant, and whether the defendant was bound by any other collective bargaining agreement. This was because analysis of these questions had "direct bearing on the legal determination that this Court may be asked to make in a later stage of this litigation." *Id.* at 622. Here, by contrast, Dean Powell's background and factual testimony on the history of the enforcement of restrictions on the unauthorized practice of law, his (and the legal profession's) understanding of

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prosecution arose and to establish what someone with Leo's extended background in the industry probably would know"); *Owen v. Kerr-McGee Corp*., 698 F.2d 236, 239-40 (5th Cir. 1983) (expert permitted to give opinion that looking for indication of existence of pipeline while clearing land was safe practice).

[7] *Compare In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 61 (S.D.N.Y. 2001), also cited by plaintiffs. Although the judge rejected declarations of "experts in judicial ethics" because the declarations were nothing more than legal opinions on whether the federal recusal statute required her recusal, she also acknowledged that "[e]xperts may . . . give limited testimony on mixed questions of law and fact" if the testimony is "focused on helping the jury or judge understand particular facts in issue . . . ." *Id.* at 65.

the practice of law, how the LegalZoom website works, and how it compares to the divorce kit in *Thompson*, will not determine either the Court's legal conclusions or the jury's findings of fact. Rather, his testimony on these points is analogous to the *Casper* professor's proffered testimony as to whether it was in the defendant's interest to impose the terms of a collective bargaining agreement on the plaintiff, which would have been admitted if his opinion had had the proper factual or methodological basis. *Id.* at 622-23.

CONCLUSION

Dean Powell's report and testimony are admissible under Rule 702 because they will assist the jury in understanding the evidence and determining facts. Doubts as to the utility of expert testimony are to be resolved in favor of admissibility. *Finch*, 630 F.3d at 1062. Accordingly, Defendant LegalZoom respectfully requests that the Court deny plaintiffs' Motion to Exclude Expert Testimony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2011, I electronically filed the above and foregoing with the clerk of court using the CM/ECF system, which will send notice of electronic filing to all counsel of record.

s/ Robert M. Thompson